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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1979

NO. 79-6715

ALVIN CULBERSON, Petitioner,

v.

STATE OF MISSISSIPPI, Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF MISSISSIPPI

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IN THE
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OCTOBER TERM 1979

No. 79-

ALVIN CULBERSON, Petitioner,

v.

STATE OF MISSISSIPPI, Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF MISSISSIPPI

Petitioner prays that a writ of certiorari issue to review the judgment of the Supreme Court of Mississippi, which affirmed on November 28, 1979, his conviction and sentence of death (rehearing denied February 20, 1980); Culberson v. State, No. 50,802.

OPINION BELOW

The opinion of the Supreme Court of Mississippi is reported at 379 So.2d 499 (1979) (Appendix A). On the first appeal taken in this case, in an opinion reported at 348 So.2d 1025 (1977), the Mississippi Supreme Court reversed the conviction and sentence of death and remanded for a bifurcated trial in accordance with Jackson v. State, 337 So.2d 1242 (1976).

JURISDICTION

This Court's jurisdiction to review by writ of certiorari is invoked under 28 U.S.C. § 1257(3), since petitioner has asserted below and is asserting here deprivation of rights secured by the Constitution of the United States. On May 23, 1980, this Court, per Mr. Justice Powell, granted petitioner's emergency application for an extension of time to June 4, 1980 within which to file this peti-

tion for a writ of certiorari. (Appendix B).

QUESTIONS PRESENTED

1. Whether petitioner's right to due process was violated when the evidence on which he was convicted and sentenced to die consisted solely of the uncorroborated testimony of an accomplice who received a widely disparate sentence and whose testimony was shown to be unreliable.

2. Whether the imposition of the sentence of death upon petitioner absent a finding that he intended to bring about the death of another person, violates the Eighth and Fourteenth Amendments to the Constitution of the United States.

3. Whether the jury at petitioner's capital murder trial was accorded virtually unguided and unrestrained discretion to sentence him to death, in violation of the Eighth and Fourteenth Amendments, as a result of Mississippi's broad and vague construction of certain aggravating circumstances under Mississippi Code § 99-19-101.

4. Whether petitioner's Sixth Amendment rights to effective assistance of counsel, compulsory process and trial by jury were denied when the trial court overruled his request for a continuance to obtain critically necessary witnesses to present his defense to the charge of capital murder.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. This case involves the Sixth, Eighth and Fourteenth Amendments to the Constitution of the United States.

2. This case also involves the following provisions of the Mississippi Code: Section 97-3-19, Section 99-19-101; and Section 99-19-105. These statutes are set forth as Appendix C to this petition.

STATEMENT OF THE CASE

Petitioner and Alvereece Pittman, black males, 22 and 19, were accused of the murder of Grady V. Evans, a white male, during the commission of a robbery.[1] Culberson v. State, 379 So. 2d at 503.

I. Testimony of Accomplice Pittman:

At both trials, the evidence used to convict petitioner and sentence him to die consisted solely of the uncorroborated testimony of the accomplice, Pittman. Petitioner did not testify at either the guilt or sentence phase. According to Pittman, on the morning of January 31, 1975 he and petitioner met in a restaurant and mutually agreed to rob someone. 379 So.2d at 502.

Pittman's account in his testimony on direct (R.170-175):

> Well, we was sitting there and Alvin came, and we just started about robbing somebody. He was broke and I was broke. We wasn't looking for nobody in particular to rob, we was just walking up towards Old Highway 49, and on our way up toward old Highway 49 we saw a Frito truck in front of the Beverly Lounge. We was walking that way, and alongside the ditch was a table leg, a stick, and Alvin picked the stick up and we went on up to the Club.
>
> * * *
>
> Q. Now, after Alvin picked up the stick, what did you do then?
>
> A. We started on walking toward the Lounge where the Frito truck was parked.
>
> * * *
>
> Q. Now, seeing that truck parked up there, Mr. Pittman, what did you do? After you had located that truck parked up there at the Beverly Lounge, what did you and the Defendant do?
>
> A. We went walking toward the truck with the stick.
>
> Q. What were you going to do?
>
> A. Going to knock the man out with the stick.
>
> Q. And do what?
>
> A. Rob him. After we knocked him out we was going to get his money.
>
> Q. Whose idea was it to commit this robbery?
>
> A. Alvin's. It was both, I agreed with him.

---

1 There being no proof of robbery, the jury was instructed on attempted robbery. The verdict was "guilty as charged," but the original indictment was never amended.

Q. Who was the one that mentioned it?

A. Alvin.

Q. And you agreed with him?

A. Yes, sir.

Q. And as you walked on up to him, tell the Court and jury exactly what happened?

A. We walked up to the Beverly Lounge and by that time we cut around, the way the truck was parked in we cut around the corner, like we was going to the Club, and by that time Grady Evans was walking out of the Club. I guess he was going to get his order.

* * *

A. We spoke and by the time we got past him -

Q. Did the man speak back?

A. Yes, sir.

Q. Was it any kind of arrogant speaking?

A. It was just a normal hello, how're you doing. And Alvin turned around and hit the man in the back of the neck with the stick, which he intended to knock him out. He knocked him down but he didn't knock him out, and the man fell on the ground and begged him, throwed up his hands and hollered for help.[2]

Q. What did the man say when he fell on the ground?

A. He hollered for help.

Q. What did the man say? Just tell the jury what he said.

A. He said "help, help me", and by that time Culberson pulled out the gun and shot him, and I said "what you done done, man? Let's go", and we took off running and run toward the Tims Motel and I slipped down going in the door, and I got back up and ran, and we got away.

II. Attack on Credibility of Accomplice:

Evidence introduced by the State and by petitioner contradicted Pittman's account. Two witnesses saw either one or two persons fleeing the scene of the crime. However, neither of these witnesses could identify Culberson as one of these persons, although one of the witnesses, Dorothy (Durr) Coleman, testified that the two men passed within eight to ten feet of where she stood and she spoke to them (R.66, 67). The second witness, Tims, testified that he saw only one man running and that, while he knew Culberson by sight, he could not identify him as the man he saw (R.166).

---

2 Although the stick was introduced into evidence by the State, there were no fingerprints, and no explanation of their absence.

Another witness, Holmes (Green), manager of the restaurant where Pittman claimed to have met with petitioner, did not recall seeing either man in the restaurant on the day in question (R.224). Yet, Pittman claimed to have spent almost two hours there (R.181), and to have spoken to this witness while he was there (R.183). In addition, petitioner's mother testified out of the presence of the jury, on the motion for new trial, that she had seen petitioner in an automobile with two other persons at approximately the time Pittman testified that the robbery took place (R.345).

Pittman's credibility was also drawn into question by a prior inconsistent statement under oath, constituting a retraction of his testimony that petitioner shot the victim (R.200). In this statement, signed on March 19, 1976 Pittman swore that he had not seen petitioner "kill, shoot or rob anyone." This statement also recounted that the prior testimony (given at the first trial) was the result of coercion and a promise of leniency (Id.). In an attempt to explain this statement, Pittman testified that he had made it because of his fear of petitioner, who was then incarcerated in a maximum security facility, in an area removed from where Pittman was detained (R.195).

On still another occasion, right after the crime, Pittman had stated that he himself had committed the murder. The person to whom he made this statement, Cora Thompson, his former girlfriend (R.193), gave the following testimony on the motion for new trial (R.350-351):

> BY MR. JOHNSTON: (Continuing)
>
> Q. What did he ask you, if you remember, about did you notice anything about a killing?
>
> A. Well, he didn't ask me. He showed me that Club, the Blue Light Club, and he said "you heard about the man that got killed in North Gulfport?" And I said "yes", and he said "Do you know who killed him?" And I said "No", and he pointed to himself.
>
> Q. I ask you, Cora, if you know whether or not Alverese had a pistol?
>
> A. Yes.
>
> Q. Did he show it to you?

A. Yes, I have seen the pistol he had before.

Q. Had you seen the pistol before the shooting?

A. Yes, I saw it before the killing.

Q. And afterwards too?

A. No, I didn't see it afterwards.

Q. Do you remember what kind of pistol it was?

A. Yes.

Q. How was it identified in your mind?

A. It was a .22 with black tape around the handle of it.

Q. I show you a pistol that has been offered in evidence in this case, and ask you if you have seen that before?

A. Yes, that's the gun.

Q. That's the gun that Alverese showed you?

A. Yes.[3]

During cross-examination, Pittman was asked if he had ever made such an admission to Cora Thompson; he denied having done so (R.194). Cross-examination also revealed that Pittman's charge had been reduced from capital murder to manslaughter, and that he had served only two and one-half years (R.197).

III. Request for Continuance To Obtain Necessary Witnesses:

Petitioner's trial attorney moved for a continuance in order to obtain crucial witnesses necessary for the presentation of the defense. This motion was renewed several times and overruled each time (R.14, 69, 72, 73, 128, 220 and 222). Two witnesses were described as being able to testify as to ownership of the gun and were said to have been near the scene of the crime shortly after it occurred. Trial counsel advised the Court that "these people must be had by the defense if it is to have a defense." In overruling the motions for continuance the court requested the sheriff to continue his efforts to find the witnesses. Several of the missing witnesses did finally testify on the motion for new trial. One witness was never found by the sheriff.

The Court below felt that the trial court did not abuse

3 Although the gun was introduced into evidence, no ballistic tests were conducted by the state, and there was no ballistic evidence to connect the gun with the bullet removed from the victim.

its discretion in denying the requests for continuance since trial counsel did not comply with the requirements of the continuance statute and support his request with affidavit as to what the witnesses would say. 379 So.2d at 505. The Court also concluded that the missing witnesses would add little of consequence to petitioner's defense. (Id.).

IV. Instructions and Argument to Jury:

The jury was instructed that it could find petitioner guilty of capital murder if it found that the murder was committed during the course of a robbery, whether or not petitioner intended to kill the victim (R.232). During the sentence phase, the jury was instructed that it might consider as aggravating circumstances the petitioner's prior convictions, the fact that the murder was committed during the commission or attempted commission of a felony, and that the offense was "especially heinous, atrocious or cruel." (R.283). These last quoted terms were not defined for the jury; and neither was the jury instructed to avoid the influence of passion, prejudice or any other arbitrary factor (R.287-289).

In his argument to the jury the district attorney suggested petitioner was not entitled to a fair trial since he did not give Grady Evans a fair trial; he also alluded to the victim's military record and to his widow and children, and to the fact that a white man had been killed by a black man. (R.297-299). Although objections to these remarks were sustained, there is no reference to them in the opinion below, or to the absence of an instruction on passion, prejudice or other arbitrary factor; nor does the record contain the complete voir dire or arguments of counsel.

The jury found that all three aggravating circumstances were present and that, since the mitigating circumstances did not outweigh the aggravating circumstances, petitioner should suffer the penalty of death (R.307).

V. Death Penalty Affirmed by Divided Court:

Petitioner's conviction was affirmed unanimously, but his death sentence divided the court 6 to 3. The three dissenting justices felt that the sentence of petitioner's co-indictee was too disproportionate "considering both the crime and the defendant;" and also considering "the dubious quality of Pittman's testimony (when) compounded by his admission of perjury in making a false affidavit concerning the homicide." 379 So.2d at 513-514.

HOW FEDERAL QUESTIONS WERE RAISED BELOW

On appeal petitioner contended his conviction was not supported by the evidence, since it consisted solely of the uncorroborated testimony of the accomplice. The Mississippi Supreme Court rejected this contention based on state practice of allowing convictions to rest on the uncorroborated testimony of an accomplice. 379 So.2d at 503. While the Court recognized that "none (of the witnesses) could identify Culberson as one of the men they observed" (Id. at 502-503), and that Pittman's testimony and credibility were flawed, the Court found that Pittman had sufficiently explained his prior inconsistent statement and that

> Pittman's testimony is neither unreasonable nor uncorroborated. The photographs, the physical facts, corroborated Pittman in every important particular. (Id. at 503).

The Court found that, while Cora Thompson's testimony "could have possibly affected (Pittman's) credibility," and that Robinson's testimony "raised an ambiguity about the ownership of the gun," it was not error to deny the repeated motions for continuance to obtain critically necessary witnesses. 379 So.2d at 505. The Mississippi Supreme Court further held that the "great disparity between the sentences of Pittman and Culberson" was merely the result of prosecutorial discretion and the accomplice's testimony was sufficient to support a sentence of death. 379 So.2d at 510.[4]

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4 The Mississippi Court reached this conclusion despite its recog-

Petitioner attacked the constitutionality of the felony-murder statute on the ground that it permitted the imposition of a death sentence on one who had not manifested an intent to kill. The Mississippi Supreme Court, holding that the "subjunctive nature of the intent to kill makes it no less . . . deserving of capital punishment than if it had been expressed," found that none of this Court's decisions required holding the statute unconstitutional on that basis. 379 So.2d at 507.

Finally, the Mississippi Supreme Court found that the "sentencing phase progressed without procedural error," and that the evidence supported the jury's findings of the statutory aggravating circumstances. 379 So.2d at 508-509.

REASONS FOR GRANTING THE WRIT

I. The Imposition of a Sentence of Death Based Solely on the Uncorroborated Testimony of An Accomplice Who Received a Widely Disparate Sentence and Whose Testimony is Shown to be Unreliable Constitutes a Violation of Due Process.

In Woodson v. North Carolina, 428 U.S. 280, 305 (1976) this Court recognized that the qualitative difference between the death penalty and any other punishment led to a "corresponding difference in the need for reliability in the determination that death is the appropriate punishment." This Court later reaffirmed the notion that there is a "significant constitutional difference between the death penalty and lesser punishments for crime." Gardner v. Florida, 430 U.S. 439 (1977).

The Mississippi Supreme Court based its affirmance, in part, on the long standing rule in the state that a conviction may rest on the uncorroborated testimony of an accomplice. 379 So.2d at 505. The Court further noted that the use of this testimony to sentence petitioner to death was necessary to sustain both the penalty and the conviction. 379 So.2d at 510. In this case of first

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nition this was the first case in Mississippi where the death penalty rests "solely upon the testimony of an admitted accomplice who . . . received a sentence of manslaughter when by his own admission he was an accomplice to capital murder." (Footnote continued from page 2).

impression the Court expressly refused to hold that while a capital conviction may rest upon the testimony of an accomplice, such evidence would be insufficient to sustain a sentence of death. Petitioner submits that recent decisions of this Court mandate a reversal of his death sentence because it rested on evidence which failed to satisfy the "need for reliability."

The crucial nature of Pittman's testimony is explicitly recognized by the Court below: "Without the testimony of Pittman, there was no evidence to place Culberson at the scene of the crime AND TO SHOW THAT HE FIRED THE FATAL SHOT. (Emphasis added). 379 So. 2d at 510. The State's other evidence merely showed that a crime had been committed and some of the circumstances thereof, but it is clear that there was no independent evidence even tending to connect petitioner with the crime.[5] From Pittman's testimony it is equally likely that he was the one who fired the fatal shot, and indeed, one witness testified that he had boasted at having done so.[6]

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5 Of the states authorizing capital punishment, several require that the accomplice's testimony must be corroborated by evidence that tends to connect the defendant with the crime. See, e.g., Alabama Code § 12-21-222; Arkansas Code § 43-2116; California Code Penal § 1111; Georgia Code Ann. § 38-121; Kentucky R. Cr. 9.-62. See also Smith v. Com., S.Ct.Ky. No. 78-SC-698-MR (Apr. 22, 1980) (reversal of death sentence based on trial court's failure to instruct jury on corroboration requirement); Hilliard v. State, 406 A.2d 415 (Md.1979); Nev. Rev.Stat. § 175.291; N.Y. CPL § 60.22.

6 It is self-evident that any accomplice is likely to be fully apprised of the circumstances of the crime inasmuch as he was, by his own admission, present at the scene. In addition, while the motive to lie may not be so readily presumed for accomplices in all cases, where the accomplice might himself have received a death sentence, that motivation is much more likely present:

> The temptation to commit perjury which influences (the accomplice's) credit must be proportioned to the punishment annexed to the crime of which the witness confesses himself guilty.

Chief Baron Joy, 1844, Evidence of Accomplices, 4, quoted in Wigmore on Evidence § 2056, p. 323.

Three justices of the Mississippi Supreme Court, in dissenting from the majority decision to affirm the death sentence, recognized that the evidence on which it was based fell far below acceptable standards of reliability:

> Consideration as dear as life, in my opinion, leaves the testimony for which it was given as questionable as if it had been purchased with cash. The dubious quality of Pittman's testimony is compounded by his admission of perjury in making a false affidavit concerning the homicide. His testimony is too suspect to permit us justly, in my opinion, to ignore the disparity of sending one man to the gas chamber while his confessed accomplice roams free after two and one-half years of confinement. I think the termination of life by the state should rest upon a firmer basis and should not portray the appearance of such gross disproportions.

379 So.2d at 514.

The instant case illustrates that a rule of evidence applicable in a non-capital case may well be inadequate to eliminate the "risk of error inherent in the truth finding process." Carey v. Piphus, 435 U.S. 247, 259 (1978), quoting from Matthews v. Eldridge, 424 U.S. 319 344 (1976). Where the stakes are life or death, there is a greater constitutional necessity for procedures which minimize the risk of error, more so than in a non-capital case where only the defendant's liberty is at issue. See, e.g. Powell v. Alabama, 287 U.S. 45, 71 (1932); Valdez v. United States, 244 U.S. 432, 450 (1917) (Clarke, J., dissenting); Lockett v. Ohio, 438 U.S. 586, 605 & n.13 (1978); Gardner v. Florida, 430 U.S. 349, 357-58 (1977); Woodson v. North Carolina, 428 U.S. 280, 305 (1976) See also, Gregg v. Georgia, 428 U.S. 153, 187 (1976) ("When a defendant's life is at stake, the Court has been particularly sensitive to insure that every safeguard is observed"); Lockett v. Ohio, supra, 438 U.S. at 604 ("We are satisfied that this qualitative difference between death and other penalties calls for a greater degree of reliability when the death sentence is imposed").

Only last term, this Court rejected an attempt by the State of Georgia to apply rules of evidence "mechanistically to defeat the ends of justice," Green v. Georgia, 442 U.S. 95, 97 (1978)

(per curiam), quoting Chambers v. Mississippi, 410 U.S. 284, 302 (1973). In the choice between life and death the use of the uncorroborated testimony of an accomplice, whose testimony is unreliable and is shown to have been effective in obtaining a lenient sentence, presents a risk that is "unacceptable and incompatible with the commands of the Eigh and Fourteenth Amendments." Lockett v. Ohio, supra, 438 U.S. at 605.

This Court should grant the writ of certiorari to consider whether petitioner's sentence should not be reversed, based on the unreliable nature of the evidence that condemned him to die.

II. The Imposition of a Sentence of Death Upon Petitioner Absent Proof That He Intended to Bring About the Death of Another Person Violates the Eighth and Fourteenth Amendments.

In Gregg v. Georgia, 428 U.S. 153 (1976), the prevailing opinion identified as a crucial Eighth Amendment inquiry "whether the punishment of death is disproportionate in relation to the crime for which it is proposed." Id., at 187. See also, Coker v. Georgia, 433 U.S. 584 (1979).

The jury which convicted petitioner and sentenced him to die was instructed that it need find only that the murder was committed during the commission or attempted commission of a robbery (R.297-298). The evidence before the jury was that the intent was to render the victim unconscious. (R.175). The evidence also indicated that the victim was shot only after he yelled for help (R.173). There is no evidence that petitioner intended to take the life of the victim.

Inflicting the sentence of death upon anyone without a finding that the defendant acted intentionally to take a human life is a disproportionate and excessive punishment forbidden by the Eighth and Fourteenth Amendments to the Constitution. In Gregg v. Georgia, supra, the prevailing opinion concluded that where the crime is "murder, and when a life has been taken deliberately by the offender, we cannot say that the punishment is invariably dis-

proportionate to the crime." 428 U.S. at 187 (emphasis added).

Punishing petitioner for the death of the victim by sentencing him to death, without a showing that he intended or deliberated on the death of the victim, is unconstitutionally disproportionate because it "makes no reasonable contribution to acceptable goals of punishment and hence is nothing more than the purposeless and needless imposition of pain and suffering." Coker v. Georgia, supra, 433 U.S. at 592.

Petitioner urges the conclusion reached by Mr. Justice White (and not disputed by the opinion of the Chief Justice) in his concurring opinion in Lockett v. Ohio, 438 U.S. 586, 624 (1978): "(I)t violates the Eighth Amendment to impose the penalty of death without a finding that the defendant possessed a purpose to cause the death of the victim." See also id., at 614 (Blackmun, J., concurring: "I would hold that death may not be inflicted for killings consistent with the Eighth Amendment without finding that the defendant engaged in conduct with the conscious purpose of producing death").

Where, as here, a capital murder conviction and death sentence are based exclusively upon a felony-murder theory with no finding of intent to kill, such a capital sentence rests upon a degree of personal culpability which is indistinguishable from Coker's. Nothing more than petitioner's involvement in the underlying felony was necessary to make him guilty of murder (capital); he [illegible] have fired the gun, as § 97-3-19(2) makes plain, "with or without any design to effect death" or even to discharge the weapon. Thus, a death in fact resulted from the felony here, unlike Coker; but it is now settled that the infliction of capital punishment based upon the nature of the offense alone ignores considerations which are "a constitutionally indispensable part of inflicting the penalty of death." Woodson v. North Carolina, 428 U.S. 280, 304 (1976)(plurality opinion); see also Lockett v. Ohio, supra; (Harry) Roberts v.

Louisiana, 431 U.S. 633, 636-637 (1977)(percuriam); (Stanislaus) Roberts v. Louisiana, 428 U.S. 325, 332-334 (1976)(plurality opinion).

The unmistakable teaching of these cases is that capital sentencing must depend upon the offender's individual culpability, not merely the category of crime that is produced by the consequences of his acts. It follows that if the offender's culpability is not appreciably greater than Coker's, the infliction of a death sentence upon him would be both disproportionate and violative of the Eighth Amendment's command that "any decision to impose the death sentence be, and appear to be, based on reason rather than caprice." Gardner v. Florida, supra, 430 U.S. at 358.[7]

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7 Indeed, the disproportionality problem under Mississippi law is even worse than that identified by Justice White in Lockett. This is so because the prosecution's proof of an unintentional robbery-murder not only satisfies the requirements for a capital murder conviction under Mississippi law, but also automatically establishes an aggravating circumstance. Since only a single aggravating circumstance need be found to support a death sentence, persons like petitioner who are convicted of nondeliberate robbery-murder enter the sentence phase with the prerequisites for the penalty of death already established, whereas, in cases "where the killing is deliberate, it is not punishable by death absent proof of (additional) aggravating circumstances." Coker v. Georgia, supra, 433 U.S at 600.

The North Carolina Supreme Court has noted and cured this anomaly --partly as a matter of statutory construction designed to avoid disproportionality in capital sentencing, partly in response to double jeopardy concerns (see also Bufford v. Alabama, ___ So.2d ____, Ala. Ct.Crim.App. 1980: "Robbery (murder) cannot be aggravated by robbery or else the appellant is punished twice for the same act")--under virtually identical crime and punishment provisions as those involved in the present case:

> "The possibility that a defendant convicted of a felony murder will be sentenced to death is disproportionately higher than the possibility that a defendant convicted of a premeditated killing will be sentenced to death due to the 'automatic' aggravating circumstance dealing with the underlying felony. To obviate this flaw in the statute, we hold that when a defendant is convicted of first degree murder under the felony murder rule, the trial judge shall not submit to the jury at the sentencing phase of the trial the aggravating circumstance concerning the underlying felony." State v. Cherry, 257 S.E.2d 551, 568 (N.C.1979).

Under Mississippi law, however, petitioner's commission of an unintentional killing during a robbery would both expose him to the death penalty for capital murder and establish the only necessary aggravating circumstance for death-sentencing purposes, thus leaving him subject to a "disproportionately higher (exposure to the death penalty) than . . . a defendant convicted of a premeditated killing."

III. The Jury at Petitioner's Capital Murder Trial Was Accorded Virtually Unguided and Unrestrained Discretion to Sentence Him to Death, in Violation of the Eighth and Fourteenth Amendments, as a Result of Mississippi's Broad and Vague Construction of Certain Aggravating Circumstances Under Mississippi Code § 99-19-101.

A. Unbridled Discretion of Mississippi Juries:

In Furman v. Georgia, 408 U.S. 238 (1972), this Court mandated that the death penalty cannot be imposed under sentencing procedures which create a substantial risk that the ultimate sanction will be inflicted in an arbitrary and capricious manner. The constitutional flaw in the pre-Furman statutes was that the sentencing jury was accorded unguided and unrestrained discretion to determine whether death was the appropriate punishment in a particular case. The capital sentencing procedures upheld in Gregg v. Georgia, 428 U.S. 153 (1976), seemed to eliminate this defect, since the Georgia statute required the jury to find a statutory aggravating circumstance before it could recommend a sentence of death, and since the Supreme Court of Georgia had "demonstrated a concern that the new sentencing procedures provide guidance to juries." Gregg v. Georgia, supra, at 202.

While Mississippi has adopted a statute containing the procedures which passed constitutional muster in Gregg, the Supreme Court of Mississippi has permitted such an open-ended construction of the statutory aggravating factors that any meaningful guidance for juries is virtually eliminated. The dangers of arbitrariness and caprice condemned in Furman have not been significantly reduced in Mississippi. Rather, as the present case vividly illustrates, there still remains a substantial risk that the death penalty will be arbitrarily inflicted by Mississippi juries.

The constitutional shortcomings in the Mississippi procedure are evident when it is compared with the capital sentencing procedures scrutinized by this Court in Gregg, and also in Profitt v. Florida, 428 U.S. 242, at 254-256. In these decisions the plurality rejected the petitioners' claims that the new capital sentencing

procedures in Georgia and Florida had failed to eliminate the unbridled discretion to impose the death penalty, which Furman had condemned. Gregg v. Georgia, 428 U.S. at 200-203; Proffitt v. Florida, 428 U.S. at 254-256. The plurality concluded that no such danger existed in those states because their supreme courts, in construing the statutory aggravating circumstances, had "demonstrated a concern that the new sentencing procedures provide guidance to the juries." Gregg, supra, at 202.

B. Overbredth and Vagueness of Heinous, Atrocious or Cruel:

Here petitioner's death sentence rests in part on the trial court's instruction based on the aggravating circumstances provision of Miss. Code Ann. § 99-19-101, that petitioner's crime was "especially heinous, atrocious or cruel." (R.288).

This provision of the Mississippi capital murder statute is so broad and vague on its face that it raises a serious question whether petitioner was given reasonable notice as to the circumstances under which he might receive the death penalty. In this case, involving a killing during an alleged attempt to rob the victim, an "especially heinous" finding was made, without the trial judge defining the terms for the benefit of the jury, but merely invoking the provision in a perfunctory manner.

Such disparity graphically demonstrates how this provision has been applied so inconsistently that Mississippi's system for adjudicating capital cases has the same potential for capricious and discriminatory application condemned by this Court in Furman. See also, Papachristou v. City of Jacksonville, 405 U.S. 156, 170 (1972) (due process violated by vague statute because "there are no standards governing the exercise of the discretion granted by the ordinance" and "the scheme permits and encourages an arbitrary and discriminatory enforcement of the law").

Nor has the Supreme Court of Mississippi provided any real guidance as to the meaning of this provision. In fact, unlike the appellate review of death sentences approved in Gregg, the Supreme

Court of Mississippi has made no serious effort to ensure that the factual situation and aggravating circumstances in this case were similar to others where the death penalty was imposed. The opinion below lists the cases which it compared with the instant case (see page 509 of the opinion). The facts in these cases, briefly, are as follows:

Bell: 1) Armed robbery and kidnap with execution style murder;

Gray: 2) Kidnap and murder of 3 year old girl;

Irving: 3) Shotgun killing at close range of proprietor of store during attempted robbery;

Jordan: 4) Kidnap and murder of wife of bank officer, then obtaining ransom from victim's husband;

Voyles: 5) Victim beaten and robbed, then killed by driving car over unconscious body;

Washington: 6) Victim shot in stomach at close range as defendant was leaving convenience store after robbery.

Petitioner submits that the facts in none of these cases compare with the facts in the instant case so as to warrant imposition of the sentence of death.

Other state supreme courts have evidenced a concern for articulating guidelines for the application of the aggravating circumstances contained in their capital sentencing statutes. See, e.g. State v. Goodman, 257 S.E.2d 569, 583-587 (N.C.1979); State v. Rust, 197 Neb. 528, 250 N.W.2d 867, 873-875 (1977); State v. Simants, 197 Neb. 549, 250 N.W.2d 881, 891-892 (1977); State v. Stewart, 197 Neb. 497, 250 N.W.2d 849, 863-865 (1977). The purpose of such interpretations is to ensure that "instructions on (the) aggravating circumstances will only be given the jury in appropriate cases." State v. Goodman, supra, 257 S.E.2d at 586.

Unfortunately the Supreme Court of Mississippi has chosen not to follow the lead of these courts. Instead, it has rejected any efforts to limit the possible interpretations of the statutory

aggravating circumstances. Washington v. State, 361 So.2d 61, 65 (Miss.1978)(court concludes that the "especially heinous, atrocious or cruel" circumstance is not vague or open-ended). The Mississippi court has upheld with little or no discussion the aggravating circumstances found by the jury in every death penalty decision to date. Reddix v. State, No. 50,999, decided February 20, 1980; Jones v. State, No. 50,944, decided January 30, 1980; Culberson v. State, 379 So.2d 499 (1979); Jordan v. State, 365 So.2d 1198 (1978); Voyles v. State, 362 So.2d 1236 (1978)(reversed on habeas corpus in No. GC 79-115-K-P, U.S.D.C., N.D.Miss., May 13, 1980, inadequate representation of counsel); Irving v. State, 361 So.2d 1360 (1978); Washington v. State, 361 So.2d 61 (1978); and Bell v. State, 360 So.2d 1206 (1978).

This record does not reflect "a concern that the new sentencing procedures provide guidance to juries." Gregg v. Georgia, supra, 428 U.S. at 202. Rather, it suggests that juries in Mississippi have complete license to return whatever aggravating circumstances they wish with little, if any, risk of their findings being disturbed on appeal.

The present case provides a vivid illustration of this disturbing development. The jury found: (1) that the capital murder was committed while the defendant was engaged in the commission of the crime of attempted robbery; (2) that the capital offense was especially heinous, atrocious or cruel; and (3) that the defendant had been previously convicted of a felony involving the use or threat of violence to the person. These circumstances were all upheld on appeal, without any suggestion that they are susceptible of widely differing interpretations or that they might have been construed in an overly broad manner by the sentencing jury. There are substantial constitutional defects, however, in the application of each of these aggravating circumstances to petitioner's case. Yet, without restraints or guidance, the jury was "free to act as arbitrarily and capriciously as (it wished) in deciding whether to impose the death penalty." Gregg, supra, 428 U.S. at 200.

C. Automatic Finding in Felony-Murder Cases:

The first aggravating circumstance found at petitioner's trial--that the capital murder was committed while the defendant was engaged in the commission of the crime of attempted robbery--has a similar constitutional defect. Because of the absence of any limitation on its application in a case where felony-murder is the capital offense, this aggravating circumstance will be, and has been, automatically found (see cases cited on page 18, supra).

This "automatic" aggravating circumstance again allows the jury unbridled discretion to impose the death sentence once it has found the defendant guilty of felony-murder. In the face of a clear possibility of arbitrary imposition of the death penalty in felony-murder cases, the Supreme Court of Mississippi has not attempted to provide guidance for juries by, for example, requiring "that when a defendant is convicted of (capital) murder under the felony-murder rule, the trial judge shall not submit to the jury at the sentencing phase of the trial the aggravating circumstance concerning the felony-murder." State v. Cherry, 257 S.E.2d 551, 568 (N.C.1979). Thus the jury in Mississippi remains free to inflict the death sentence arbitrarily.

IV. Petitioner's Sixth Amendment Rights to Effective Assistance of Counsel, Compulsory Process and Trial by Jury were Denied when the Trial Court Overruled His Request for a Continuance to Obtain Critically Necessary Witnesses to Present His Defense to the Charge of Capital Murder.

Effective assistance of counsel was denied petitioner by the denial of his motions for continuance to obtain critically necessary witnesses who were essential to the presentation of his defense. "Few rights are more fundamental than the right of an accused to present witnesses in his own defense." Chambers v. Mississippi, 410 U.S. 284, 302-303 (1973). The constitutional right to assistance of counsel guarantees every criminal defendant "effective aid in the preparation and trial of the case." Powell v. Alabama, 287 U.S. 45, 71 (1932)(emphasis added); accord: Anders v.

California, 386 U.S. 238 (1967)(effective assistance required on appeal).

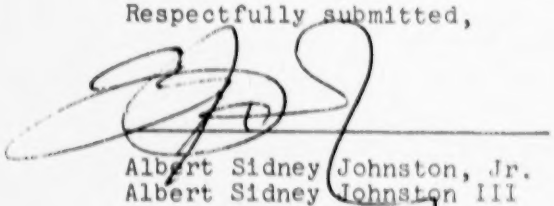
While fundamental fairness and effective assistance of counsel are required in every criminal proceeding, the need for such safeguards is particularly compelling in a capital case, since "death is a punishment different from all other sanctions in kind rather than in degree." Woodson v. North Carolina, 428 U.S. 280, 303-304 (1976).

CONCLUSION

For the reasons stated herein, petitioner respectfully requests that a writ of certiorari be granted.

Dated: June 2, 1980.

Respectfully submitted,



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APPENDIX A

RECEIVED
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Alvin CULBERSON

v.

STATE of Mississippi.

No. 50802.

Supreme Court of Mississippi.

Nov. 28, 1979.

Rehearing Denied Feb. 20, 1980.

After remand from the Supreme Court, 348 So.2d 1025, defendant was convicted in the Circuit Court, Harrison County, Leslie B. Grant, J., of capital murder and sentenced to death, and he appealed. On guilt-determining phase, the Supreme Court, Patterson, C. J., held that: (1) evidence including testimony of accomplice, was sufficient to sustain defendant's conviction; (2) indictment charging underlying crime of robbery and referring to capital murder statute was sufficient to apprise defendant of constituent charge against him; (3) trial court did not err in denying defendant's motion for continuance on ground that two of his witnesses were not present; (4) defendant was not denied right to testify in his own behalf; (5) alleged discrepancy between form of verdict suggested by trial court and form of verdict returned by jury did not preclude death sentence; and (6) felony-murder statute was not unconstitutional. On sentencing phase, the Court, Sugg, J., held that: (1) death sentence was not imposed under influence of passion, prejudice, or any other arbitrary factor; (2) evidence supported jury's finding of statutory aggravating circumstances; and (3) prosecutorial discretion was not abused because accomplice, who did not fire fatal shot, was permitted to plead guilty to manslaughter, while defendant, who fired fatal shot, was given death penalty.

Affirmed.

Walker, J., specially concurred in sentencing determining phase and filed opinion in which Robertson, P. J., and Sugg and Lee, JJ., concurred.

Patterson, C. J., dissented from sentence determining phase and filed opinion in which Smith, P. J., and Broom, J., joined.

Smith, P. J., dissented from sentence-determining phase and filed opinion in which Patterson, C. J., and Broom, J., joined.

1. Criminal Law ⇐510

An accused may be convicted on uncorroborated testimony of an accomplice.

2. Criminal Law ⇐508(9)

Although testimony of an accomplice, if unreasonable, improbable, self-contradictory or if impeached by an unimpeached witness, is not sufficient to carry burden of proof for conviction, reasonable explanation of contradictions may be offered, leaving evidence sufficient for jury's resolution if it accepts the explanation.

3. Homicide ⇐250

Evidence, including testimony of accomplice, was sufficient to sustain defendant's conviction of capital murder, even though a prior contradictory statement of the accomplice had been introduced into evidence.

4. Homicide ⇐138

Indictment for capital murder is sufficient if constituent offense is related to greater charge in indictment by language clearly informing indictee of underlying felony in which he was engaged, or its attempt, at time of the homicide. Code 1972, § 97-3-19(2)(e).

5. Homicide ⇐18(1)

Language "engaged in the commission of" in capital murder statute includes attempt to commit constituent felony, completed constituent felony, as well as immediate postfelony acts of the accused so connected to cardinal charge as to become a part of it, the res gestae. Code 1972, § 97-3-19(2)(e).

See publication Words and Phrases for other judicial constructions and definitions.

6. Indictment and Information ⇐71.4(5)

Indictment for capital murder charging robbery as the underlying felony was sufficient to apprise defendant of constituent charge against him even though testimony only related to an attempted robbery. Code 1972, § 97-3-19(2)(e).

7. Homicide ⇐128, 138

Capital murder indictment wherein underlying felony was attempted robbery and which included words "did wilfully kill" sufficiently alleged an intent and overt act as required for attempted crimes. Code 1972, § 97-3-19(2)(e).

8. Criminal Law ⇐603(7), 608

Defendant failed to satisfy statutory requirements governing granting or denial of a continuance in that his motion was not supported by affidavits and did not state with particularity material testimony expected from absent witnesses. Code 1972, § 99-15-29.

9. Criminal Law ⇐595(1)

In prosecution for felony-murder, trial court did not err in denying defendant's motion for continuance requested due to absence of witnesses where testimony which would have been presented by such witnesses only raised ambiguity concerning ownership of gun used in commission of the crime, and did not address possession of the gun when fatal shot was fired.

10. Witnesses ⇐88

Defendant, who first informed trial court of his desire to testify during hearing on his motion for a new trial, and who did not testify during his trial due to advice from his counsel, was not denied right to testify in his own behalf, particularly where record disclosed competent representation on behalf of defendant.

11. Criminal Law ⇐814(2)

Instructions for the State which did not assume as true any material fact but were based upon evidence and subjunctively stated in order to leave all factual conflicts to jury for resolution were properly granted.

12. Homicide ⇐312

In prosecution for capital murder, alleged discrepancy between form of verdict suggested by trial court and form of verdict returned by jury did not preclude death sentence where it was clear that jury's verdict "guilty as charged" meant "guilty of capital murder." Code 1972, § 97-3-19(2)(e).

13. Homicide ⇐351

Language "with or without any design to effect death" in capital murder statute did not render the statute unconstitutional by permitting imposition of death upon one who harbors no specific intent to kill since the statute places no limit upon mitigating factors that may be considered in capital sentencing process and since it includes minor role of defendant as a mitigating factor. Code 1972, §§ 97-3-19(2)(e), 97-3-21, 99-19-101.

See publication Words and Phrases for other judicial constructions and definitions.

14. Jury ⇐108

A challenge for cause may be properly sustained when a prospective juror indicates that he will automatically vote against imposition of capital punishment without regard to any evidence that might be developed, but he may be accepted as a juror if, in spite of his nonbelief in capital punishment, he can put such belief aside and follow law and evidence in accord with his oath to render a true verdict.

On Sentencing Phase

15. Homicide ⇐354

Defendant's prior kidnapping conviction should have been admitted as an aggravating circumstance in his sentencing after conviction for felony-murder, but its omission was immaterial since death penalty was imposed. Code 1972, § 97-3-19(2)(e).

16. Homicide ⇐354

Sentence of death imposed on defendant after conviction for murder was not imposed under influence of passion, prejudice, or any other arbitrary factor. Code 1972, § 99-19-105(3)(a).

17. Homicide ⇐354

Evidence resulting in defendant's conviction for capital murder supported jury's finding of statutory aggravating circumstances. Code 1972, §§ 99-19-105(3)(b), 99-19-101.

18. Homicide ⇐329

Statute requiring Supreme Court, in reviewing imposition of death penalty, to determine whether sentence of death is excessive or disproportionate to penalty imposed in similar cases includes not only cases having been determined by the Court in which death sentence had been imposed or rejected on the merits, but also cases involving multiple defendants when one participant is given death penalty and an accomplice less than death. Code 1972, § 99-19-105(3)(c).

19. District and Prosecuting Attorneys ⇐8

Prosecutorial discretion was not abused because accomplice, who did not fire fatal shot, was permitted to plead guilty to manslaughter while defendant, who fired fatal shot, was given death penalty. Code 1972, §§ 97-3-19(2)(e), 99-19-105(3)(c).

Albert Sidney Johnston, Jr., Biloxi, for appellant.

A. F. Summer, Atty. Gen., by Billy L. Gore, Special Asst. Atty. Gen., Jackson, for appellee.

EN BANC.

PATTERSON, Chief Justice, for the Court on the Guilt-Determining Phase; SUGG, Justice, for the Majority on the Sentence-Determining Phase.

Alvin Culberson was convicted of capital murder and sentenced to death by the Circuit Court of the First Judicial District of Harrison County. A similar verdict and sentence on the same charge were reversed and remanded in *Culberson v. State*, 348 So.2d 1025 (Miss.1977). We there directed a new trial with bifurcation pursuant to our

decision in *Jackson v. State*, 337 So.2d 1242 (Miss.1976). We presently affirm the guilty verdict.

The evidence adduced at Culberson's second trial sufficed to convince the jury of appellant's guilt. The state established through Alvarese Pittman, an accomplice, that he was with Culberson on January 31, 1975, when they met in a restaurant and schemed a robbery. In furtherance of their plan, Pittman and Culberson left the restaurant seeking a victim, and as they walked along a highway, Culberson picked up a stick, a table leg, believed to be needed for their purpose. Pittman's testimony concerning their intentions and the stick follows in part:

Q. What did you all talk about?

A. Well, we was sitting there and Alvin came, and we just started about robbing somebody. He was broke and I was broke. We wasn't looking for nobody in particular to rob, we was just walking up towards Old Highway 49, and on our way up toward Old Highway 49 we saw a Frito truck in front of the Beverly Lounge. We was walking that way, and alongside the ditch was a table leg, a stick and Alvin picked the stick up and we went on up to the Club.

* * * * * *

Q. What were you going to do?

A. Going to knock the man out with the stick.

Q. And do what?

A. Rob him. After we knocked him out we was going to get his money.

Q. Whose idea was it to commit this robbery?

A. Alvin's. It was both, I agreed with him.

Just before obtaining the stick or immediately afterward, Pittman and Culberson observed a delivery truck parked in front of the "Beverly Lounge" business establishment. They also saw someone, their prospective victim, leave the lounge and move toward the truck when the following occurred, according to Pittman:

Q. Now, as you approached the man, the two of you, tell the Court and jury what took place.

A. Alvin spoke and I spoke, and he spoke back.

Q. Where was the man at this time?

A. He was about ten or fifteen feet, between ten and fifteen feet from the door, going to the truck.

Q. From the door of the Beverly Lounge?

A. Yes, going back to the truck. I guess he was going to get his order.

Q. And then what happened?

A. We spoke and by the time we got past him— .

Q. Did the man speak back?

A. Yes, sir.

Q. Was it any kind of arrogant speaking?

A. It was just a normal hello, how're you doing. And Alvin turned around and hit the man in the back of the neck with the stick, which he intended to knock him out. He knocked him down but he didn't knock him out, and the man fell on the ground and begged him, throwed up his hands and hollered for help.

Q. What did the man say when he fell to the ground?

A. He hollered for help.

Q. What did the man say? Just tell the jury what he said.

A. He said "help, help me", and by that time Culberson pulled out the gun and shot him, and I said "what you done done, man? Let's go", and we took off running and run toward the Tims Motel and I slipped down going in the door, and I got back up and ran, and we got away.

Pittman also testified he was not aware that Culberson was armed with a pistol and would not have accompanied him had he known so.

Only Pittman and Culberson witnessed the shooting although others heard the shot and saw two men leaving the scene. While these witnesses could describe the general appearance and clothing of the fleeing men, none could identify Culberson as one of the

men they observed on the occasion. The remainder of the state's evidence concerned the death of Grady Evans by a bullet wound, pictures of the scene and other requisites to establish the corpus delicti. Culberson did not testify.

I.

[1] The appellant contends his conviction is contrary to the weight of the evidence. This argument has little merit, in our opinion. It is well established in our jurisprudence that an accused may be convicted on the uncorroborated testimony of an accomplice. *Rich v. State*, 322 So.2d 468 (Miss.1975); *Moore v. State*, 291 So.2d 187 (Miss.1974); *Young v. State*, 212 Miss. 460, 54 So.2d 671 (1951); *Larry v. State*, 211 Miss. 563, 52 So.2d 292 (1951); *Boutwell v. State*, 165 Miss. 16, 144 So. 479 (1932); *Matthews v. State*, 148 Miss. 696, 114 So. 816 (1927).

[2] While it is true the testimony of an accomplice must be considered with caution, *Feranda v. State*, 267 So.2d 305 (Miss.1972), the record here demonstrates that Pittman's testimony is neither unreasonable nor uncorroborated. The photographs, the physical facts, corroborate Pittman in every important particular. Although the testimony of an accomplice, if unreasonable, improbable, self-contradictory or if impeached by an unimpeached witness, is not sufficient to carry the burden of proof for conviction, *Feranda, supra*, we nevertheless think reasonable explanation of contradictions may be offered, leaving the evidence sufficient for the jury's resolution if it accepts the explanation.

[3] In cross-examining Pittman, a prior contradictory statement consisting of an affidavit executed by Pittman while in prison was introduced into evidence. He swore in it that he did not see Culberson shoot anyone. The contradiction was explained by him as being the result of fear because he thought there was a "contract" on his life while he was incarcerated. He disclaimed the truth of the affidavit from the witness stand and reaffirmed that Culberson was the person who killed Evans. The jurors resolved the truthfulness of the different statements by accepting the accomplice's last version after being properly instructed that an accomplice's testimony must be regarded with caution and suspicion. We are of the opinion the jury had the right to accept as true Pittman's current testimony. As stated, there was sufficient evidence to sustain the jury's verdict.

II.

Culberson next contends the testimony at trial varied from the indictment, requiring reversal. The indictment follows in part:

> That ALVERREECE PITTMAN AND ALVIN CULBERSON . . . on or about the 31st day of January in the year of our Lord, 1975, . . . did unlawfully, wilfully & feloniously, with malice aforethought, kill and murder one Grady V. Evans, a human being, while engaged in the commission of robbery upon him, in violation of Section 97-3-19, Sub-Section 2(e), Mississippi Code of 1972, as amended, . . .

The statute on capital murder referred to in the indictment states in part:

> § 97-3-19.
>
> • • • • • •
>
> (2) The killing of a human being without the authority of law by any means or in any manner shall be capital murder in the following cases:
>
> • • • • • •
>
> (e) When done with or without any design to effect, by any person engaged in the commission of the crime of . . robbery, or in any attempt to commit such felonies, . . .

[4-6] Culberson's initial argument is that the indictment charged robbery whereas the testimony only relates to an attempted robbery. Subsection 2(e) appears in the indictment as an exact reference to the constituent violation with which the appellant is charged. The statutory language, "engaged in the commission of the crime of . . . robbery," which coincides with that of the indictment, "while engaged in

the commission of robbery," is sufficiently comprehensive, in our opinion, to include the attempt. The legislative intention in elevating a homicide from murder to capital murder was upon the basis that it be committed during the commission of one of the felonies enumerated in the statute, rape, burglary, kidnapping, arson or robbery. It is enough if the constituent offense is related to the greater charge in the indictment by language clearly informing the indictee of the underlying felony in which he was engaged, or its attempt, at the time of the homicide. In our opinion, the statutory language, "engaged in the commission of," includes the attempt to commit the constituent felony, the completed constituent felony, as well as the immediate post-felony acts of the accused so connected to the cardinal charge as to become a part of it, the res gestae. *Pickle v. State*, 345 So.2d 623 (Miss.1977); *Lipscomb v. State*, 223 Md. 599, 165 A.2d 918 (1960); *MacAvoy v. State*, 144 Neb. 827, 15 N.W.2d 45 (1944). The language of the indictment was sufficient to apprise Culberson of the constituent charge against him, thereby enabling him to prepare a defense to it, if any he had.

[7] The appellant next suggests the indictment is defective because it does not allege an intent and overt act as required for attempted crimes, citing *Dill v. State*, 149 Miss. 167, 115 So. 203 (1928), and *Miller v. State*, 130 Miss. 730, 95 So. 83 (1922). We cannot agree, because the indictment clearly states that Culberson did willfully kill a human being, etc. The words, "did willfully kill," mean the completed act of homicide which also necessarily means there was an overt act sufficient to accomplish that result. We reject this contention by repeating the indictment is clear, unambiguous and was sufficient to inform the appellant of the constituent offense with which he was charged.

III.

On October 17, 1977, the day before the testimony in the trial got under way, defendant moved for a continuance because two of his witnesses were not present though subpoenas had been issued for them. He urged their testimony was necessary to a proper defense. No pretrial ruling on the motion appears, but at the conclusion of the first day's testimony, defendant again moved for a continuance since the subpoenas for the witnesses had been returned "not found." The court overruled the motion but directed the sheriff to continue his efforts to find the witnesses. The motions were twice renewed and overruled during the trial.

The motions arose once more when the defendant moved for a new trial after verdict and sentence. At that time defense counsel stated the absent witnesses would have shown appellant to be innocent of the charge against him. Five prospective witnesses were named, only one of whom appeared at the hearing to testify in appellant's behalf that day. The hearing continued the next day when three of the missing witnesses appeared.

The first, Cora Thompson, testified in part as follows:

Q. I ask you, Cora, if you know Alverese Pittman?

A. Yes.

Q. Did you see him on or about January 31, 1975?

A. Yes.

* * * * * *

Q. What did he ask you, if you remember, about did you notice anything about a killing?

A. Well, he didn't ask me. He showed me that Club, the Blue Light Club, and he said "you heard about the man that got killed in North Gulfport? And I said "yes", and he said "Do you know who killed him"? And I said "No", and he pointed to himself.

Q. I ask you, Cora, if you know whether or not Alverese had a pistol?

A. Yes.

Q. Did he show it to you?

A. Yes, I have seen the pistol he had before.

Q. Had you seen the pistol before the shooting?

A. Yes, I saw it before the killing.

Q. And afterwards too?

A. No, I didn't see it afterwards.

Q. Do you remember what kind of pistol it was?

A. Yes.

Q. How was it identified in your mind?

A. It was a .22 with black tape around the handle of it.

Q. I show you a pistol that has been offered in evidence in this case, and ask you if you have seen that before?

A. Yes, that's the gun.

Q. That's the gun that Alverese showed you?

A. Yes.

Q. And did he have that gun on the 31st day of January, 1975?

A. I don't know.

The next witness, Jackie Skinner, related testimony concerning the whereabouts of Leon Mills, the remaining witness subpoenaed by the defense who had not yet appeared to testify.

The third, D. Robinson, stated that in March 1975, he approached a man named "Slick" at appellant's request and received from him a package containing the gun that had been introduced into evidence through Cora Thompson. Robinson testified he delivered the package to a Mrs. Brumfield, appellant's mother, as he had been directed to do. Robinson was unsure who owned the gun and could not remember seeing Pittman with it. The identity of "Slick" remains a mystery.

[8] By Mississippi Code Annotated section 99-15-29 (1972) the granting or denial of a continuance is within the discretion of the trial judge. Appellant failed to satisfy the requirements of the statute in that his motion was not supported by affidavit and did not state with particularity the material testimony expected from the absent witnesses.

[9] All but one of these witnesses eventually testified on the motion for a new trial. Their testimony, summarized above, hardly adds a new dimension to appellant's case, in our opinion, although it must be acknowledged that Cora Thompson's testimony about Pittman's demonstration could have possibly affected his credibility. Otherwise, her testimony, when considered with that of Skinner and Robinson, only raises an ambiguity concerning the ownership of the gun. It does not address the possession of the gun when the fatal shot was fired. Under these circumstances and the commonplace knowledge of the continuance statute, we conclude there was no error in denying defendant's motion for a continuance. *Dyer v. State*, 300 So.2d 788 (Miss.1974); *Saucier v. State*, 259 So.2d 484 (Miss.1972); and *Ford v. State*, 227 So.2d 454 (Miss.1969).

IV.

[10] Appellant next argues that he was denied the right to testify in his own behalf. The first time the court was informed the appellant desired to testify was during the hearing on the motion for a new trial. Culberson testified he had not been a witness at his first trial because his counsel had informed him it was not necessary. He stated that he did not take the stand during his second trial because his counsel had told him "[w]ell, just hold on," and he never got a chance to testify.

The trial court did not refuse any request by appellant to testify simply because no such request was ever made. For this reason, *Gray v. State*, 351 So.2d 1342 (Miss. 1977), is readily distinguishable. There, at the close of the guilt-determining phase, the court explicitly denied the accused the right to make a statement to the jury as our constitution permits. Here, appellant's counsel intentionally kept Culberson off the stand, not an unwise trial tactic it would seem, in view of appellant's several prior convictions which could have been exposed had he become a witness.

Culberson's family retained an attorney of considerable trial experience and good judgment to represent him. We have previously held that one who retains his own attorney waives his right to complain of his

competency. *Rogers v. State*, 307 So.2d 551 (Miss.1975); *Miller v. State*, 231 So.2d 178 (Miss.1970). We think this particularly true when, as here, the record discloses competent representation on behalf of the defendant.

V.

It is next argued that four instructions proffered by the state were improperly granted and three proffered by Culberson were improperly refused.

Appellant concedes his trial counsel did not object to the state's instructions as required by Mississippi Supreme Court Rule 42. Appellate counsel argues, however, that we should deem this an extreme case and waive strict application of Rule 42 as we did in *Toney v. State*, 298 So.2d 716 (Miss.1974). We do so with reluctance and only because this is a capital case.

[11] In contrast with *Marble v. State*, 195 Miss. 386, 15 So.2d 693 (1943), the instructions for the state did not assume as true any material fact, but were based upon the evidence and subjunctively stated in order to leave all factual conflicts to the jury for resolution. *Compare Dickins v. State*, 208 Miss. 69, 94, 43 So.2d 366 (1949). The remainder of the criticisms of the state's instructions only reiterate that the weight of the evidence does not support the verdict. We have rejected this argument heretofore and do not repeat it.

We are further of the opinion Instruction D-2 was properly refused. Although it might have been proper in a circumstantial evidence case, *Barrett v. State*, 253 So.2d 806 (Miss.1971), the record here does not reveal circumstantial evidence but rather the direct testimony of an accomplice concerning the occurrence.

Instruction D-3 was also properly refused. It has been condemned by this Court for various reasons on several occasions. *Dubose v. State*, 320 So.2d 773 (Miss.1975); *Wells v. State*, 288 So.2d 860 (Miss.1974); and *Carr v. State*, 192 Miss. 152, 4 So.2d 887 (1942).

Lastly, Instruction D-10 was properly refused because it is peremptory for the defendant and raises once more the issue of the sufficiency of the evidence which we have heretofore addressed.

VI.

The second trial was confined in the first phase to Culberson's guilt or innocence of capital murder. Before voir dire, the trial judge made the following statement to the prospective jurors:

> In these cases now the jury first determines whether or not the defendant is guilty of the charge. Then if you do decide he is guilty, there will be another hearing on the question of the sentencing, but for the time being you are only concerned with the question of whether or not the defendant is guilty of the charge.

At the conclusion of the first phase, the jurors were instructed their verdict might take the following form: "We, the jury, find the defendant guilty of capital murder." After deliberating for two hours and forty-three minutes, they returned a verdict which read: "We, the jury, find the accused guilty as charged."

[12] *Williamson v. State*, 167 Miss. 783, 149 So. 795 (1933), is cited in support of the argument that a discrepancy between the form of the verdict suggested by the court and the form of the verdict returned by the jury precludes the death sentence. This case has no application to a bifurcated trial and is not persuasive. Court records reveal identical verdict forms in the following capital cases: *Caldwell v. State*, 347 So.2d 1389 (Miss.1977); *Henderson v. State*, 342 So.2d 744 (Miss.1977); and *Jackson v. State*, 337 So.2d 1242 (Miss.1976). Furthermore, in *Ellard v. State*, 248 Miss. 313, 158 So.2d 690 (1963), we stated and adopted:

> " 'The general rule as found in the texts is, that ordinarily the verdict is sufficient in form if it expresses the intent of the jury so that the court can understand it, 22 Eng.Pl. & Pr., p. 891; or that the test of the validity of a verdict is whether or not it is an intelligible answer to the issues submitted to the jury . . . .' "
> (248 Miss. at 318-19, 158 So.2d at 692)

Presently, we do not understand the verdict to deviate from the jury's clear intention. Moreover, no effort was made by the defendant to clarify the alleged discrepancy; the judge polled the jury, and each juror acknowledged the verdict reflected his or her vote, and none expressed any doubt about the verdict prior to or during the punishment phase of the trial. It is convincingly clear to us that the jurors understood "guilty as charged" to mean "guilty of capital murder." The difference argued gives rise only to a distinction without meaning, in our opinion.

VII.

The next issues concern the constitutionality of the felony murder statute and the propriety of the death sentence.

(a)

[13] Appellant contends the felony murder statute, Mississippi Code Annotated section 97-3-19(2)(e) cannot pass constitutional scrutiny because the language "with or without any design to effect death" permits imposition of death upon one who harbors no specific intent to kill. We rejected a similar argument in *Gray, supra*, but express further views.

All states have endorsed the common-law concept of felony murder in some form. In it the felon is considered "at risk" while committing the felony so that if a homicide results, it is considered murder, or, as in our state, capital murder if associated with the felonies, designated by the legislature. The legislature's intent was to protect the citizenry from the evil of the lesser felony by imposing a greater penalty upon a homicide occurring during its commission. Some authorities view the felony murder statutes as imputing or irrebuttably presuming a specific intent to kill from the association of the homicide with the underlying felony. These same authorities acknowledge "[l]ong standing judicial approval of the presumption provides strong indication that the presumption comports with due process." Comment, Constitutional Limitations Upon the Use of Statutory Criminal Presumptions in the Felony Murder Rule, 46 Miss. L.J. 1021, 1035 (1975); *see also Barnes v. United States*, 412 U.S. 837, 93 S.Ct. 2357, 37 L.Ed.2d 380 (1973).

The appellant argues, however, that only 0.5% of robberies result in homicide. Therefore, it cannot be said the robber in every case intended to kill. This may be true, but we think it overlooks the great danger the aggressor willfully imposes upon his victim. The constituent crime with its hazardous potential is that which the legislature intended to deter by permitting capital punishment if death results from the felonious undertaking.

Presently, we can say without doubt the appellant schemed and participated in the unlawful undertaking which resulted in death. The subjunctive nature of the intention to kill makes it no less deliberate and no less deserving of capital punishment than if it had been expressed, in our opinion. The felon who causes death in furthering his crime manifests a callous disregard for human life, because he subordinates the life of the innocent to his desire for gain, thereby inviting the outrage of a society understandably bent upon protecting itself from physical violence.

As far as we can determine, the United States Supreme Court has not held a statute unconstitutional simply because it permits the death penalty to be imposed without affirmative proof of a specific intent to kill. In *Lockett v. Ohio*, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978), the Court considered a case in which a young woman had been sentenced to death for her role in an armed robbery in which a pawnshop owner was killed by her accomplice. She was not in the pawnshop when the shooting occurred. Nevertheless, the Court did not hold the death penalty unconstitutional per se, but reversed only because the Ohio capital punishment statute improperly limited the mitigating factors to be considered in the sentencing process to certain narrowly defined factors, not including the minor role of the defendant among partners in crime. Only Mr. Justices Brennan and White considered the death penalty per se unconstitutional in felony murder cases in which af-

firmative evidence of a specific intent to kill has not been made.

Our statute places no limit upon the mitigating factors that may be considered in the capital sentencing process, and since it includes the minor role of the defendant as a mitigating factor, we conclude it suffers no constitutional infirmity under *Lockett*. See Miss.Code Ann. § 97-3-21 (Supp.1977), as construed in *Jackson v. State*, 337 So.2d 1242, 1254 (Miss.1976); and Miss.Code Ann. § 99-19-101 (Supp.1977).

(b)

[14] Following the preferred practice, the trial court retained the jury used in the guilt phase for the second phase directed to punishment. Defendant complains the court permitted improper *voir dire* of the venire, arguing that a "death prone" jury emerged after challenges by the state eliminated those opposed to capital punishment. We do not have the full transcript of the *voir dire* conducted by the parties before us and therefore cannot address this point in detail. However, we do note that a challenge for cause may be properly sustained when a prospective juror indicates that he will automatically vote against the imposition of capital punishment without regard to any evidence that might be developed. *Witherspoon v. Illinois*, 391 U.S. 510, 88 S.Ct. 1770, 20 L.Ed.2d 776 (1968); *Spinkellink v. Wainwright*, 578 F.2d 582, 592-93 (5th Cir. 1978). Conversely, he may be accepted as a juror if in spite of his nonbelief in capital punishment he can put such belief aside and follow the law and evidence in accord with his oath to render a true verdict.

After deliberation, the Court is unanimous in its opinion that the jury's verdict of guilty and the trial procedures leading to it should be affirmed.

THE SENTENCING PHASE

SUGG, Justice, for the Majority:

All justices concur in what has been written by Justice Patterson for the Court but there is some disagreement among the justices on the question of whether the death penalty should be affirmed. A majority of the justices are of the opinion the death penalty should be affirmed. The views of the minority are expressed in a dissent by Justice Patterson.

The record covering the sentencing phase spans some forty-four pages. The state introduced aggravating circumstances consisting of prior criminal convictions of armed robbery and assault and battery with intent to kill. The state objected to the exclusion of evidence of a kidnapping conviction and cross-assigns this exclusion as error on appeal. In instructing the jury the court limited the aggravating circumstances which might be considered in sentencing to (1) whether the offense occurred in the commission of an attempted robbery, (2) whether the offense was especially heinous, atrocious, or cruel, and (3) whether the defendant had previously been convicted of felonies involving the use or threat of violence to the person. The court, in compliance with *Lockett*, *supra*, 438 U.S. at 605, 98 S.Ct. at 2965, 57 L.Ed.2d at 990, in no way constrained the jury with respect to the number or quality of mitigating circumstances which might be considered in appellant's favor.

[15] The sentencing phase progressed without procedural error, in our opinion, although we do think the kidnapping conviction should have been admitted as an aggravating circumstance. It was not admitted out of precaution by the court, because a colloquy had arisen between the attorneys as to whether kidnapping is a crime of violence. Presently, its omission is immaterial, because the death penalty was imposed.

By Mississippi Code Annotated section 99-19-105 (Supp.1978) the legislature mandated this Court to review the imposition of the death penalty. It follows in pertinent part:

> (1) Whenever the death penalty is imposed, and upon the judgment becoming final in the trial court, the sentence shall be reviewed on the record by the Mississippi Supreme Court

(2) The Mississippi Supreme Court shall consider the punishment as well as any errors enumerated by way of appeal.
(3) With regard to the sentence, the court shall determine:
(a) Whether the sentence of death was imposed under the influence of passion, prejudice, or any other arbitrary factor;
(b) Whether the evidence supports the jury's or judge's finding of a statutory aggravating circumstance as enumerated in section 99-19-101; and
(c) Whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant.

* * * * * *

(5) The court shall include in its decision a reference to those similar cases which it took into consideration. In addition to its authority regarding correction of errors, the court, with regard to review of death sentences, shall be authorized to:
(a) Affirm the sentence of death; or
(b) Set the sentence aside and remand the case for modification of the sentence to imprisonment for life.
(6) . . . The court shall render its decision on legal errors enumerated, the factual substantiation of the verdict, and the validity of the sentence.

[16] In response to Subsection (3)(a) above, the Court is of the opinion the sentence of death was not imposed under the influence of passion, prejudice, or any other arbitrary factor.

[17] In response to Subsection (3)(b) above, the Court is of the opinion the evidence does support the jury's finding of the statutory aggravating circumstances as enumerated in Section 99-19-101.

In response to Subsection (3)(c) above, the Court is of the opinion the sentence of death is not excessive and disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant. This response requires amplification.

Heretofore, this Court's review of punishment has been largely confined to the ascertainment of whether the sentence was within the limits of the statute. If no prejudicial error was found in the trial proceedings, the sentence, if within such limits, would be upheld. The mandate of Section 99-19-105 is novel, because it places this Court in the stream of the punishment process by requiring that we determine whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases. In complying with the reviewing role which we now occupy in this and other death imposed cases, we have reviewed the following capital cases in which we have rendered dispositive decisions affirming death sentences and setting dates for executions: *Gray v. State*, 375 So.2d 994 (Miss.1979); *Jordan v. State*, 365 So.2d 1198 (Miss.1979); *Voyles v. State*, 362 So.2d 1236 (Miss.1978); *Irving v. State*, 361 So.2d 1360 (Miss.1978); *Washington v. State*, 361 So.2d 61 (Miss.1978); and *Bell v. State*, 360 So.2d 1206 (Miss.1978).

Our research reveals that in none of these cases does a death sentence rest solely upon the testimony of an admitted accomplice who has given state's evidence and received a sentence of manslaughter when by his own admission he was an accomplice to capital murder. A somewhat similar case is *Voyles, supra*, in which a conviction and death sentence depended upon a young witness who was present when the crime occurred, but who denied any participation in the homicide committed by his uncle, thereby creating, we think, a distinction between that case and this.

The record here reveals that Pittman participated in the constituent felony from its inception until Evans was killed. He did not deny this participation, but acknowledged it in detail, only claiming he was not aware Culberson carried a firearm and would not have accompanied him had he known so. Pittman admitted his willing participation in the crime through the blow being struck with the table leg to render the victim unconscious. He qualified his role in the capital murder by denying he intended homicide or knew that such was imminent. It is clear, however, that this qualification does not relieve Pittman of his

confessed guilt of the crime of capital murder. *Price v. State*, 362 So.2d 204 (Miss. 1978).

[18] This leaves the question of whether the words in Subsection (3)(c), "imposed in similar cases, considering both the crime and the defendant," include for our review and comparison the exact and therefore similar crime of the accomplice and the sentence received by him for it. We construe the language to include not only the capital cases heretofore determined by this Court in which the death sentence has been imposed or rejected on the merits, but also cases involving multiple defendants when one participant is given the death penalty and an accomplice less than death. One of the questions arising in such cases is whether a sentence of less than death to an accomplice was a result of prosecutorial discretion. An affirmative answer raises a second question, was the discretion abused?

The proof in this case shows that Pittman and Culberson conspired to commit robbery and participated in the attempted robbery of decedent with Culberson firing the fatal shot. It was established by other witnesses that there were two assailants, but none of the witnesses could identify either Pittman or Culberson as the assailants. Pittman, one of the participants in the crime, turned state's evidence, and his testimony was the sole evidence that Culberson fired the fatal shot.

This case involves prosecutorial discretion which was necessary. Without the testimony of Pittman, there was no evidence to place Culberson at the scene of the crime and to show that he fired the fatal shot. We recognize the great disparity between the sentences of Pittman and Culberson, but if the state is not permitted to exercise prosecutorial discretion in order to obtain the testimony of a participant in a capital murder by permitting the one furnishing the testimony to plead guilty to a lesser crime, crimes such as the one in this case would not be solved and all participants would go free. When two or more persons commit a crime and cannot be identified except by one of the participants, the state must be allowed some discretion in securing the testimony of one of the participants in order to solve the crime.

To hold otherwise would be tantamount to holding: (1) The testimony of an accomplice in a capital murder case is sufficient to sustain a conviction in the guilty phase of the trial, but is not sufficient to sustain the death penalty in the sentencing phase. (2) If an accomplice who testifies for the state in a death penalty case is not given the death penalty, the trigger man may not be given the death penalty. Such result is not required by our statutes, the decisions of the United States Supreme Court, or our decisions.

[19] We hold prosecutorial discretion was not abused because Pittman, who did not fire the fatal shot, was permitted to plead guilty to manslaughter, while Culberson, the one who fired the fatal shot, was given the death penalty. We hold the death penalty was not applied capriciously in this case. It is a proper sentence for the senseless and unprovoked murder committed by Culberson, who, after first knocking the victim down with a table leg, then shot the victim while he was lying on the ground begging, "Help me, help me."

AFFIRMED, AND EXECUTION SET FOR JANUARY 10, 1980.

All Justices concur in guilt-determining phase. In sentence-determining phase.

ROBERTSON, P. J., and WALKER, LEE, BOWLING and COFER, JJ., concur.

WALKER, J., ROBERTSON, P. J., SUGG and LEE, JJ., specially concur.

PATTERSON, C. J., SMITH, P. J., and BROOM, J., dissent.

WALKER, Justice, specially concurring:

I concur with the majority on both the guilt and sentencing phase of Culberson's trial as well as the verdict and sentence imposed. However, I feel constrained to comment on the necessity and propriety of prosecutorial discretion which resulted in the disparity between the sentences of Pitt-

man and Culberson, who were both originally charged with capital murder. Culberson received the penalty of death while Pittman was sentenced to fifteen years in the penitentiary.

Prosecutorial discretion is absolutely necessary and an essential element of our system of criminal jurisprudence. Without it, the courts of this Country would be hopelessly bogged down in a backlog of cases and the cost of court administration would be astronomical.

The United States Supreme Court has not yet, nor do I anticipate that it will ever hold that the practice of prosecutorial discretion is so inherently unfair as to render its practice unconstitutional. The practice and necessity of prosecutorial discretion has been alluded to by a number of the justices of the United States Supreme Court beginning with *Gregg v. Georgia*, 428 U.S. 153, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976), wherein the newly enacted statutory provisions relative to death penalty cases were upheld. In that case Mr. Justice White, with whom Mr. Chief Justice Burger and Mr. Justice Rehnquist joined, made the following observation:

> Petitioner also argues that decisions made by the prosecutor—either in negotiating a plea to some offense lesser than capital murder or in simply declining to charge capital murder—are standardless and will inexorably result in the wanton and freakish imposition of the penalty condemned by the judgment in *Furman*. I address this point separately because the cases in which no capital offense is charged escape the view of the Georgia Supreme Court and are not considered by it in determining whether a particular sentence is excessive or disproportionate.
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> Petitioner's argument that prosecutors behave in a standardless fashion in deciding which cases to try as capital felonies is unsupported by any facts. Petitioner simply asserts that since prosecutors have the power not to charge capital felonies they will exercise that power in a standardless fashion. This is untenable. Absent facts to the contrary, it cannot be assumed that prosecutors will be motivated in their charging decision by factors other than the strength of their case and the likelihood that a jury would impose the death penalty if it convicts. Unless prosecutors are incompetent in their judgments, the standards by which they decide whether to charge a capital felony will be the same as those by which the jury will decide the questions of guilt and sentence. Thus defendants will escape the death penalty through prosecutorial charging decisions only because the offense is not sufficiently serious; or because the proof is insufficiently strong. This does not cause the system to be standardless any more than the jury's decision to impose life imprisonment on a defendant whose crime is deemed insufficiently serious or its decision to acquit someone who is probably guilty but whose guilt is not established beyond a reasonable doubt. Thus the prosecutor's charging decisions are unlikely to have removed from the sample of cases considered by the Georgia Supreme Court any which are truly "similar." If the cases really were "similar" in relevant respects, it is unlikely that prosecutors would fail to prosecute them as capital cases; and I am unwilling to assume the contrary.
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> Petitioner's argument that there is an unconstitutional amount of discretion in the system which separates those suspects who receive the death penalty from those who receive life imprisonment, a lesser penalty, or are acquitted or never charged, seems to be in final analysis an indictment of our entire system of justice. Petitioner has argued, in effect, that no matter how effective the death penalty may be as a punishment, government, created and run as it must be by humans, is inevitably incompetent to administer it. This cannot be accepted as a proposition of constitutional law. Imposition of the death penalty is surely an awesome responsibility for any system of justice and those who participate in it. Mistakes will be made and discriminations will occur which will be difficult to

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AFFIRMED, AND EXECUTION SET FOR JANUARY 10, 1980.

All Justices concur in guilt-determining phase. In sentence-determining phase.

ROBERTSON, P. J., and WALKER, LEE, BOWLING and COFER, JJ., concur.

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explain. However, one of society's most basic tasks is that of protecting the lives of its citizens and one of the most basic ways in which it achieves the task is through criminal laws against murder. I decline to interfere with the manner in which Georgia has chosen to enforce such laws on what is simply an assertion of lack of faith in the ability of the system of justice to operate in a fundamentally fair manner.

In *Jurek v. Texas*, 428 U.S. 262, 96 S.Ct. 2950, 49 L.Ed.2d 929 (1973), Mr. Justice Stevens, speaking for the Court, said:

> The petitioner first asserts that arbitrariness still pervades the entire criminal system of Texas—from the prosecutor's decision whether to charge a capital offense in the first place and then whether to engage in plea bargaining, through the jury's consideration of lesser included offenses, to the Governor's ultimate power to commute death sentences. This contention fundamentally misinterprets the *Furman* decision, and we reject it for the reasons set out in our opinion today in *Gregg v. Georgia*, [428 U.S. 153,] at 199, 96 S.Ct. 2909 [at 2937], 49 L.Ed.2d 859.

At the same term of court, in *Roberts v. Louisiana*, 428 U.S. 325, 96 S.Ct. 3001, 49 L.Ed.2d 974 (1976), it was argued, *inter alia*, that prosecutorial discretion would result in arbitrary sentences and therefore be unconstitutional. Justice White, in a dissenting opinion, joined by Mr. Chief Justice Burger, Mr. Justice Blackmun, and Mr. Justice Rehnquist, observed:

> Nor am I convinced that the Louisiana death penalty for first-degree murder is substantially more vulnerable because the prosecutor is vested with discretion as to the selection and filing of charges, by the practice of plea bargaining or by the power of executive clemency. Petitioner argues that these characteristics of the criminal justice system in Louisiana, combined with the discretion arguably left to the jury as discussed above, insure that the death penalty will be as seldom and arbitrarily applied as it was under the predecessor statutes. The Louisiana statutes, however, define the elements of first-degree murder, and I cannot accept the assertion that state prosecutors will systematically fail to file first-degree murder charges when the evidence warrants it or to seek convictions for first-degree murder on less than adequate evidence. Of course, someone must exercise discretion and judgment as to what charges are to be filed and against whom; but this essential process is nothing more than the rational enforcement of the State's criminal law and the sensible operation of the criminal justice system. The discretion with which Louisiana's prosecutors are invested and which appears to be no more than normal, furnishes no basis for inferring that capital crimes will be prosecuted so arbitrarily and infrequently that the present death penalty statute is invalid under *Furman v. Georgia*.
>
> I have much the same reaction to plea bargaining and executive clemency. A prosecutor may seek or accept pleas to lesser offenses where he is not confident of his first-degree murder case, but this is merely the proper exercise of the prosecutor's discretion as I have already discussed. So too, as illustrated by this case and the North Carolina case, *Woodson v. North Carolina*, 428 U.S. 280, 96 S.Ct. 2978, 49 L.Ed.2d 944, some defendants who otherwise would have been tried for first-degree murder, convicted, and sentenced to death are permitted to plead to lesser offenses because they are willing to testify against their codefendants. This is a grisly trade, but it is not irrational; for it is aimed at insuring the successful conclusion of a first-degree murder case against one or more other defendants. Whatever else the practice may be, it is neither inexplicable, freakish, nor violative of the Eighth Amendment. Nor has it been condemned by this Court under other provisions of the Constitution. *Santobello v. New York*, 404 U.S. 257, 92 S.Ct. 495, 30 L.Ed.2d 427 (1971); *North Carolina v. Alford*, 400 U.S. 25, 91 S.Ct. 160, 27 L.Ed.2d 162 (1970); *Parker v. North Carolina*, 397 U.S. 790, 90 S.Ct.

1458, 25 L.Ed.2d 785 (1970); *Brady v. United States*, 397 U.S. 742, 90 S.Ct. 1463, 25 L.Ed.2d 747 (1970). See also *Chaffin v. Stynchcombe*, 412 U.S. 17, 30-31, 93 S.Ct. 1977, [1984,] 36 L.Ed.2d 714 (1973). *See also Spinkellink v. Wainwright*, 578 F.2d 582 (5th Cir. 1978).

In cases where a prosecuting attorney must resort to plea bargaining in order to obtain the cooperation of one or more accomplices in a brutal killing such as the one before us in order to convict other culprits to the crime, we must assume, unless there is evidence to the contrary, that he acted in good faith and in the best interest of the state. In those instances, we are unable to and should not attempt to compare the sentence of the cooperating accomplice or accomplices with other defendants who denied their guilt, placed their fate in the hands of a jury and received the death penalty. The rationale being: (1) the accomplice has confessed his guilt and placed himself on the mercy of the court; (2) he has cooperated with the state by giving important testimony resulting in his accomplice's conviction and sentence, who might have otherwise gone free; and (3) we have no way of knowing what mitigating circumstances were considered by the district attorney in selecting a particular codefendant for plea bargaining. Since it was not necessary to put the plea-bargaining accomplice to trial, we have no reliable record of witnesses testifying under oath with reference to such accomplice's criminal disposition or mitigating factors in his favor to consider as we are required to do. It cannot be seriously argued that every accomplice should receive the death penalty in cases where it is imposed on one of the participants to a crime. There are too many factors which must be considered when dealing with individuals for such a rule to be practical, such as the age, the degree of participation in the crime of each of the defendants, prior criminal record or lack of it, mentality, as well as other factors too numerous to mention.

In my view, it is the primary duty of this Court, when reviewing death penalty cases, to see that it is only imposed in the most severe cases involving the brutal, heinous and unnecessary killing of a human being. We have done this in all of the death penalty cases coming to this Court since *Jackson v. State*, 337 So.2d 1242 (Miss.1976); *Bell v. State*, 360 So.2d 1206 (Miss.1976); *Washington v. State*, 361 So.2d 61 (Miss.1978); *Irving v. State*, 361 So.2d 1360 (Miss.1978); *Voyles v. State*, 362 So.2d 1236 (Miss.1978); *Jordan v. State*, 365 So.2d 1198 (Miss.1979); and *Gray v. State*, 375 So.2d 994 (Miss. 1979). To place any greater burden on the Court would only be requiring it to attempt the impossible. There have never been two identical crimes involving defendants with identical characteristics and I venture to say there never will be.

We must be careful, lest we impose so many restrictions, impossible of reasonable application, that the death penalty statutes will be, for all practical purposes, nullified. That is a matter for the legislature and not the courts.

The death penalty in this case was properly affirmed.

ROBERTSON, P. J., SUGG and LEE, JJ., concur.

PATTERSON, Chief Justice, dissenting:

I dissent from the majority decision to affirm the death sentence. I do so because of my belief that justice requires a more proportionate sentence, "considering both the crime and the defendant," prescribed by Mississippi Code Annotated section 99-19-105(3)(c).

Alvin Culberson and Alvarese Pittman planned an armed robbery that resulted in a homicide. Although Culberson and Pittman were both indicted for capital murder, an offense for which they could have been put to death, Pittman was permitted to plead guilty to manslaughter for which he received a fifteen-year sentence and served only two and one-half years.

We have no record of the transaction, but apparently Pittman was accorded this singular treatment by the state in exchange for his testimony, the result being to lift from his shoulders the awesome burden of a

probable death sentence. Consideration as dear as life, in my opinion, leaves the testimony for which it was given as questionable as if it had been purchased with cash. The dubious quality of Pittman's testimony is compounded by his admission of perjury in making a false affidavit concerning the homicide. His testimony is too suspect to permit us justly, in my opinion, to ignore the disparity of sending one man to the gas chamber while his confessed accomplice roams free after two and one-half years of confinement. I think the termination of life by the state should rest upon a firmer basis and should not portray the appearance of such gross disproportions.

I do not share the apprehensions of the majority that prosecutorial discretion will be abolished by imposing a life sentence upon Culberson, nor do I think we will establish a rule that an accomplice can never be sentenced to death by imposing such sentence. The statute mandates a review of each case upon an individual basis, and I would restrict the views I have expressed to the peculiar circumstances of this case.

In conclusion, I would reverse for the imposition of a life sentence.

SMITH, P. J., and BROOM, J., join in this dissent.

SMITH, Presiding Justice, dissenting:

I concur in the conclusion reached by Chief Justice Patterson in his dissent. The extreme leniency extended to Culberson's accomplice, a confessed participant in the murder for which Culberson stands sentenced to die, presents an unacceptable disparity in the consequences visited upon these joint actors. Death for Culberson and a brief confinement for his accomplice reflects treatment approaching a denial of equal protection of the laws and which, in my judgment, is incapable of being justified by the practical necessities of what has become known as plea bargaining.

The conviction of Culberson rests, in substantial part, upon the testimony of the accomplice. This Court, in an unbroken line of decisions, extending back over many years, has adhered to the rule that testimony of an accomplice is to be viewed with caution and suspicion, although it may be sufficient to support a conviction. The sound reasons for the rule are set out in the many cases dealing with the subject and will not be repeated here.

A short imprisonment for the accomplice, who has confessed his guilt, and death for Culberson, who declined to plead guilty and whose conviction rests in large part upon the testimony of the accomplice, presents a situation which possibly may be warranted in some future case presenting different circumstances which might be found to justify it. But here, considering, as we must, the defendant, the crime, the nature of the evidence upon which the defendant was convicted, and all of the circumstances of the case, I am forced to conclude that Culberson's conviction should stand but that he should not be put to death.

PATTERSON, C. J., and BROOM, J., join in this dissent.

Supreme Court of the United States

No. A-1015

ALVIN CULBERSON,

Petitioner,

v.

MISSISSIPPI

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

UPON CONSIDERATION of the application of counsel for petitioner(s),

IT IS ORDERED that the time for filing a petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including June 4, , 19 80, without prejudice to the Court's consideration of whether this application has been filed in time.

/s/ Lewis F. Powell, Jr.
Associate Justice of the Supreme Court of the United States

Dated this 23
day of May, 19 80.

Appendix B

§97-3-19. Homicide--murder defined--capital murder.

(1) The killing of a human being without the authority of law by any means or in any manner shall be murder in the following cases:

(a) When done with deliberate design to effect the death of the person killed, or of any human being;

(b) When done in the commission of an act eminently dangerous to others and evincing a depraved heart, regardless of human life, although without any premeditated design to effect the death of any particular individual;

(c) When done without any design to effect death by any person engaged in the commission of any felony other than rape, kidnapping, burglary, arson or robbery, or in any attempt to commit such felonies.

(2) The killing of a human being without the authority of law by any means or in any manner shall be capital murder in the following cases:

(a) Murder which is perpetrated by killing a peace officer or fireman while such officer or fireman is acting in his official capacity or by reason of an act performed in his official capacity, and with knowledge that the victim was a peace officer or fireman. For purposes of this paragraph, the term "peace officer" means sheriff of counties and their deputies, constables, marshals and policemen of cities and towns, game wardens, parole officers, a judge, prosecuting attorney or any other court official, agents of the alcoholic beverage control division of the state tax commission, agents of the bureau of narcotics, personnel of the Mississippi Highway Patrol, and the superintendent and his deputies, guards, officers and other employees of the Mississippi State Penitentiary;

(b) Murder which is perpetrated by a person who is under sentence of life imprisonment;

(c) Murder which is perpetrated by use or detonation of a bomb or explosive device;

(d) Murder which is perpetrated by any person who has been offered or has received anything of value for committing the murder, and all parties to such a murder, are guilty as principals;

(e) When done with or without any design to effect death, by any person engaged in the commission of the crime of rape, burglary, kidnapping, arson or robbery, or in any attempt to commit such felonies;

(f) Murder which is perpetrated by the killing of any elected official of a county, municipal, state or federal government with knowledge that the victim was such public official.

§97-3-21. Homicide--penalty for murder or capital murder.

Every person who shall be convicted of murder shall be sentenced by the court to imprisonment for life in the state penitentiary.

Every person who shall be convicted of capital murder shall be sentenced to death or to imprisonment for life in the state penitentiary.

§99-19-101. Jury to determine punishment in capital cases in separate sentencing proceeding; aggravating and mitigating circumstances to be considered.

(1) Upon conviction or adjudication of guilt of a defendant of capital murder or other capital offense, the court shall conduct a separate sentencing proceeding to determine whether the defendant should be sentenced to death or life imprisonment. The proceeding shall be conducted by the trial judge before the trial jury as soon as practicable. If, through impossibility or inability, the trial jury is unable to reconvene for a hearing on the issue of penalty, having determined the guilt of the accused, the trial judge may summon a jury to determine the issue of the imposition of the penalty. If the trial jury has been waived, or if the defendant pleaded guilty, the sentencing proceeding shall be conducted before a jury impaneled for that purpose. In the proceeding, evidence may be presented as to any matter that the court deems relevant to sentence, and shall include matters relating to any of the aggravating or mitigating circumstances. However, this subsection shall not be construed to authorize the introduction of any evidence secured in violation of the Constitutions of the United States or of the State of Mississippi. The state and the defendant and/or his counsel shall be permitted to present arguments for or against the sentence of death.

(2) After hearing all the evidence, the jury shall deliberate on the following matters:

(a) Whether sufficient aggravating circumstances exist as enumerated in subsection (5) of this section;

(b) Whether sufficient mitigating circumstances exist as enumerated in subsection (6) of this section, which outweigh the aggravating circumstances found to exist; and

(c) Based on these considerations, whether the defendant should be sentenced to life imprisonment or death.

(3) For the jury to impose a sentence of death, it must unanimously find in writing the following:

(a) That sufficient aggravating circumstances exist as enumerated in subsection (5) of this section; and

(b) That there are insufficient mitigating circumstances, as enumerated in subsection (6), to outweigh the aggravating circumstances.

In each case in which the jury imposes the death sentence, the determination of the jury shall be supported by specific written findings of fact based upon the circumstances in sub-

section (6) of this section and upon the records of the trial and the sentencing proceedings. If the jury does not make the findings requiring the death sentence, the court shall impose a sentence of life imprisonment.

(4) The judgment of conviction and sentence of death shall be subject to automatic review by the supreme court of Mississippi within sixty (60) days after certification by the sentencing court of entire record, unless the time is extended for an additional period by the supreme court for good cause shown. Such review by the supreme court shall have priority over all other cases and shall be heard in accordance with rules promulgated by the supreme court.

(5) Aggravating circumstances shall be limited to the following:

(a) The capital offense was committed by a person under sentence of imprisonment.

(b) The defendant was previously convicted of another capital offense or of a felony involving the use or threat of violence to the person.

(c) The defendant knowingly created a great risk of death to many persons.

(d) The capital offense was committed while the defendant was engaged, or was an accomplice, in the commission of, or an attempt to commit, or flight after committing or attempting to commit, any robbery, rape, arson, burglary, kidnapping, aircraft piracy or the unlawful use or detonation of a bomb or explosive device.

(e) The capital offense was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody.

(f) The capital offense was committed for pecuniary gain.

(g) The capital offense was committed to disrupt or hinder the lawful exercise of any governmental function or the enforcement of laws.

(h) The capital offense was especially heinous, atrocious or cruel.

(6) Mitigating circumstances shall be the following:

(a) The defendant has no significant history of prior criminal activity.

(b) The offense was committed while the defendant was under the influence of extreme mental or emotional disturbance.

(c) The victim was a participant in the defendant's conduct or consented to the act.

(d) The defendant was an accomplice in the capital offense committed by another person and his participation was relatively minor.

(e) The defendant acted under extreme duress or under the substantial domination of another person.

(f) The capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired.

(g) The age of the defendant at the time of the crime.

99-19-103. Instructions; aggravating circumstances shall be designated by jury in writing; effect of jury's failure to agree on punishment.

The statutory instructions as determined by the trial judge to be warranted by the evidence shall be given in the charge and in writing to the jury for its deliberation. The jury, if its verdict be a unanimous recommendation of death, shall designate in writing, signed by the foreman of the jury, the statutory aggravating circumstances which it unanimously found beyond a reasonable doubt. Unless at least one (1) of the statutory aggravating circumstances enumerated in section 99-19-101 is so found or if it is found that any such aggravating circumstance is overcome by the finding of one or more mitigating circumstances, the death penalty shall not be imposed. If the jury cannot, within a reasonable time, agree as to punishment, the judge shall dismiss the jury and impose a sentence of imprisonment for life.

99-19-105. Review by supreme court of imposition of death penalty.

(1) Whenever the death penalty is imposed, and upon the judgment becoming final in the trial court, the sentence shall be reviewed on the record by the Mississippi Supreme Court. The clerk of the trial court, within ten (10) days after receiving the transcript, shall transmit the entire record and transcript to the Mississippi Supreme Court together with a notice prepared by the clerk and a report prepared by the trial judge. The notice shall set forth the title and docket number of the case, the name of the defendant and the name and address of his attorney, a narrative statement of the judgment, the offense, and the punishment prescribed. The report shall be in the form of a standard questionnaire prepared and supplied by the Mississippi Supreme Court, a copy of which shall be served upon counsel for the state and counsel for the defendant.

(2) The Mississippi Supreme Court shall consider the punishment as well as any errors enumerated by way of appeal.

(3) With regard to the sentence, the court shall determine:

(a) Whether the sentence of death was imposed under the influence of passion, prejudice or any other arbitrary factor;

(b) Whether the evidence supports the jury's or judge's finding of a statutory aggravating circumstance as enumerated in section 99-19-101; and

(c) Whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant.

(4) Both the defendant and the state shall have the right to submit briefs within the time provided by the court, and to present oral argument to the court.

(5) The court shall include in its decision a reference to those similar cases which it took into consideration. In addition to the authority regarding correction of errors, the court, with regard to review of death sentences, shall be authorized to

(a) Affirm the sentence of death; or

(b) Set the sentence aside and remand the case for modification of the sentence to imprisonment for life.

(6) The sentence review shall be in addition to direct appeal, if taken, and the review and appeal shall be consolidated for consideration. The court shall render its decision on legal errors enumerated, the factual substantiation of the verdict, and the validity of the sentence.